



## US Supreme Court leaves legal precedent supporting net neutrality

November 6, 2018

As the OCC has reported on our website on several occasions over the last few years, net neutrality has had its ups and downs.

The greatest up was on February 26, 2015, when Consumer Counsel Elin Swanson Katz, State Broadband Policy Coordinator William Vallee, Senator Beth Bye, and Comptroller Kevin Lembo were invited by FCC Chair Tom Wheeler and his Special Counsel Gigi Sohn to attend an historic vote to ensure “net neutrality” to protect consumers with a level playing field, ordering that no consumer must pay more or charge more to gain faster speed at the expense of other users.

[Consumer Counsel and Other State Official Attend Historic FCC Hearing on Net Neutrality](#)



Consumer Counsel and Senator Beth Bye talking with **Apple co-founder Steve Wozniak (“The Woz”)** at the Historic FCC Hearing on **Net Neutrality**.

Photo: Vallee

We also reported on the low point last December 2017 when the [Pai FCC overturned the 2015 Order](#) by repealing (in effect, June 2018) the consumer protections granted by the Wheeler FCC’s net neutrality rules.

On Monday, November 5, 2018, the Supreme Court of the U.S. (SCOTUS) declined to hear a Trump administration and telecom industry federal appeal of the 2016 U.S. Court of Appeals for the District of Columbia Circuit ruling in favor of the 2015 Wheeler FCC Order in favor of net

neutrality. By so doing, SCOTUS essentially makes no "decision on the merits," but the ramifications of not taking up the industry appeal (opposing net neutrality) of the D.C. Circuit's supportive decision on the issue certainly has the effect of providing a legal precedent that will undoubtedly reemerge as a positive for consumer arguments when net neutrality rises again. Though proponents on both sides of the argument believe that the denial of certiorari by SCOTUS of the Trump administration and industry appeal is a positive for their arguments, it cannot be denied that SCOTUS could have voted to declare the DC Circuit decision moot in light of the FCC's 2018 Order. By leaving the DC Circuit decision in play, consumer advocates can argue the merits of that case in the outstanding appeals presently moving through the federal judicial system.

In the absence of a decision by SCOTUS, the DC Circuit decision thus stands as good law, with the FCC's 2015 order remaining that broadband is classified as a telecom service with broadband providers prohibited from blocking or requiring payments for certain internet content. It is thus a mixed bag since the 2015 Order remains valid as a FCC decision blessed by one of the most powerful federal circuit courts in the country, but subject to the Pai FCC Order repealing the 2015 Order also standing. It will thus remain for the D.C. Circuit to once again provide a new order that . . . will undoubtedly wind up before SCOTUS in the next year or two, no matter which way the court decides the matter.

The Trump Administration and industry appellants had clearly hoped to fully eliminate the 2016 DC Circuit Court ruling through actions by SCOTUS to establish a clear record, but those hopes were dashed yesterday. All par for the course for this obviously divisive issue, as indicated that the 2018 Order itself is presently being heard for a future DC Circuit Court decision on appeal by supporters of net neutrality, such as Facebook, Amazon, and Alphabet (owner of Google), and public governmental consumer advocates (consolidated cases beginning with [Mozilla Corp. v. FCC, case 18-1051](#) will be heard in February 2019). Sen. Ed Markey (D., Mass.) supported an amicus brief in that appeal joined by over 100 members of the Senate and House.

FCC Commissioner Jessica Rosenworcel (Democrat), a Wesleyan grad born in West Hartford, had voted in support of the 2015 net neutrality order and tweeted yesterday that "It wasn't enough for this @FCC to roll back #NetNeutrality. It actually petitioned the Supreme Court to erase history and wipe out an earlier court decision upholding open internet policies. But today the Supreme Court refused to do so."

The orders list from SCOTUS noted that three of the most conservative justices, Thomas, Alito, and Gorsuch would have granted the petition for

certiorari filed by the Trump Administration/industry telecom companies, then vacating the DC Circuit decision, and remanding to dismiss the cases as moot. The OCC had expected as much or even an earlier withdrawal of the petition to SCOTUS by the parties. The SCOTUS notice further stated that Chief Justice John G. Roberts Jr. and Associate Justice Brett M. Kavanaugh (who dissented as a judge on the D.C. Circuit on the original 2016 decision) "took no part in the consideration or decision of these petitions."

The Trump Administration and industry parties have also moved in the U.S. District Court for the District of Eastern California ([consolidated in the Ninth Circuit](#) (San Francisco) by the Judicial Panel on Multidistrict Litigation, with a stay granted pending resolution of an appeal of the FCC's 2018 Order) to stop California's new state net neutrality law from taking effect next year. The state has agreed to the stay.

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